

CITY OF BALTIMORE

STEPHANIE RAWLINGS-BLAKE, Mayor

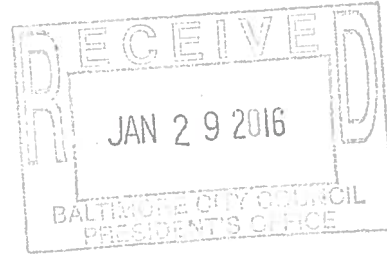


DEPARTMENT OF LAW

GEORGE A. NILSON, City Solicitor
101 City Hall
Baltimore, Maryland 21202

January 29, 2016

The Honorable President and Members
of the Baltimore City Council
Attn: Executive Secretary
Room 409, City Hall
100 N. Holliday Street
Baltimore, Maryland 21202



Re: City Council Bill 16-0615 – Baltimore City Open Data Program

Dear President and City Council Members:

The Law Department has reviewed City Council Bill 16-0615 for form and legal sufficiency. The bill would create Subtitle 9 in Article 1 of the City Code to govern an Open Data Program. It defines certain relevant terms and mandates a Chief Data Officer oversee the development of a City program that proactively releases “all publishable data, making it freely available in open formats, with no restrictions on use or reuse, and fully accessible to the broadest range of users for varying purposes.” The data is to be “high quality, updated data, with documentation (metadata) and permanence to encourage maximal use.” The data to be released is that created by a City “agency,” which the bill defines as “any department, authority, office, board commission, council, committee or other unit of the city government” or by “a third-party contractor that creates or acquires information, records or other data on behalf of a City agency.”

Current Laws that Govern Information Release

The City’s own Charter provides a framework for the maintenance and release of information by municipal agencies. City Charter, Art. I, §7(a). This includes a provision that allows “the head of the agency or the municipal officer by or on behalf of whom the record is kept” to decide if the record is to be released. *Id.* This part of the Charter will govern if there were ever a conflict between it and the provisions in this bill. City Charter, Art. III, §11.

Similarly, the Maryland Public Information Act governs the release of information by all governmental units in the state. Md. Code, Gen. Prov., §4-101, *et. seq.* This bill is generally consistent with that state law. However, the bill creates a term for “sensitive information,” defined as information for which the risk of publication exceeds the benefits. While that concept is generally consistent with the concept of discretionary exemptions in Part IV of Subtitle 3 of the Public Information Act, which allows non-disclosure when “a custodian believes that inspection of part of a public record by the applicant would be contrary to the public interest . . . as provided in this part” IV of Subtitle 3 of the Act, if there were ever a conflict, the state law would govern. *See, e.g., Worton Creek Marina, LLC v. Claggett*, 381 Md. 499, 512-513 (Md. 2004)(citations omitted); Md. Code, Gen. Prov. §4-343.

Fav w/ Amend

Required Amendment:

The Mayor and City Council cannot compel a third-party contractor to disclose all “information, records or other data,” that it creates on behalf of or acquires from the government if an existing contract between the contractor and the Mayor and City Council contains terms that govern information release and the language in this bill, if enacted, would impair the parties’ existing contractual obligation. U.S. Const. art. I, §10, cl. 1. Whether or not a law impairs an existing contractual obligation must be determined on a case by case basis. *Havemeyer v. Iowa County*, 70 U.S. 294 (1865). Thus, the Law Department suggests amending the bill to add “unless otherwise provided in an existing contract” on line 13 in page 2.

Suggested Amendments:

Metadata

The term “metadata” is vague because it can mean contextual information, system metadata, application metadata or other terms. See, e.g., The Sedona Conference®, ©2007, *The Sedona Principles (Second Edition), June 2007: Best Practices Recommendations & Principles for Addressing Electronic Document Production*, p. 3-4, (last visited January 27, 2016), <<https://thesedonaconference.org/download-pub/81>>.

Because that term has so many meanings it is unclear what type of metadata this law is intending to make available. Some of it will likely be proprietary computer code or information entwined with it in database fields, and therefore unable to be disclosed. See, e.g., *Prince George’s County v. The Washington Post Co.*, 149 Md. App. 289, 335 (2003)(government may not disclose proprietary intellectual property contained in database fields); Md. Code, Gen. Prov., §4-101. Metadata that “contains information about the security of an information system,” is also unable to be released to the public. Md. Code, Gen. Prov., §4-338.

State law allows governments to remove certain metadata from any electronic information made public. Md. Code, Gen. Prov. §4-205. This is generally background information that is unique to the file pathways and computer software and is generally not useful to the end user. Rather, useful metadata, such as database fields and spreadsheet formulas are specifically defined to not be metadata under the state’s Public Information Act and therefore not subject to the removal provision unless another exemption applies.

Mandatory production of all metadata, if that is the intent by using the term in this bill, is unwise because of the cyber security risks it may pose. See, e.g., Aliya Sternstein, nextgov.com, *Hackers Breach Oregon Refuge Employee Data*, (last visited January 27, 2016), <<http://www.nextgov.com/cybersecurity/2016/01/hackers-breach-oregon-refuge-employee-data-dump-car-breathalyzers-source-code-ftc-leaks-privacy-forum-participants-email-addresses/125192/>>. Although metadata may not seem at the time of production to compromise computer infrastructure, it could later be mined for information that allows hackers access to the computer systems. Cyber tools not foreseen today could be developed in the future and be used to mine information from metadata published by the government. For these reasons, the Law Department recommends removing the term “metadata” from the bill. Even removed, the bill

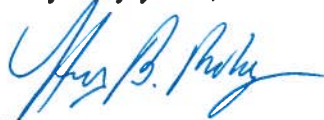
will still be requiring the publication of the data to “encourage maximal use” but will better assist in protecting cyber security in a world of evolving technology.

Definition of Agency

The Law Department notes that the definition of agency is slightly different than the term “municipal agency” as used in the City Charter. Charter, Art. I, §2(j)(“all departments, bureaus, boards and commissions and persons not embraced in a department who exercise authority comparable to that of heads of departments or bureaus.”). The Council could consider if it wishes to conform these definitions.

Subject to the required amendment discussed herein and with the comments provided, the Law Department approves the bill for form and legal sufficiency and has attached to this bill text of both the required and suggested amendments.

Very truly yours,



Hilary Ruley
Chief Solicitor

cc: The Honorable Councilmember Scott
George Nilson, City Solicitor
Angela C. Gibson, Mayor’s Legislative Liaison
Elena DiPietro, Chief Solicitor, General Counsel Division
Victor Tervalo, Chief Solicitor
Jennifer Landis, Assistant Solicitor

AMENDMENTS TO COUNCIL BILL 16-0615
(1st Reader Copy)

Amendment No. 1

On page 2, in line 13, before the period, insert "UNLESS OTHERWISE PROVIDED IN AN EXISTING CONTRACT"

Amendment No. 2

On page 3, in line 26, delete "(METADATA)"

Amendment No. 3

On page 2, in line 2, after "MEANS" insert "MUNICIPAL AGENCY AS STATED IN SECTION 2(J) OF ARTICLE I OF THE CITY CHARTER"; and on page 2, strike lines 3 through 7.